80-6604

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SUPREME COURT, U.S.

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD WAYNE THOMAS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN
THIS COURT IN FORMA PAUPERIS

Petitioner, by and through counsel, moves this Honorable Court, pursuant to Rule 46 of this Court, to permit him to proceed with this action in forma pauperis. As evidence of petitioner's poverty and in accordance with Rule 46, petitioner has submitted a notarized Affidavit of Poverty.

Petitioner prays that this Court grant this motion.

Respectfully submitted,

Russell F. Canan /sk

Russell F. Canan

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STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, DONALD WAYNE THOMAS, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes_____ No ✓

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. APR. 1979: $372.00 PER MO.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No ✓

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes_____ No ✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No ✓

a. If the answer is yes, describe the property and state its approxamate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None ✓

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Donald W. Thomas

DONALD WAYNE THOMAS

STATE OF GEORGIA
COUNTY OF _____

SUBSCRIBED AND SWORN TO
before me this the 20 day of March, 1981.

Mary L. Dyson

My Commission expires:
My Commission Expires August 6, 1984

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-against-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

I. Whether, in affirming the imposition of the sentence of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the words "torture" and "depravity of mind" in finding aggravating circumstances as to violate the Eighth and Fourteenth Amendments to the Constitution?

II. Where the sentence of death was originally imposed by a jury whose discretion was not properly channeled and directed, did the failure of the Supreme Court of Georgia to remand the case for a new sentencing hearing violate petitioner's right under the Eighth and Fourteenth Amendments?

III. Whether the Supreme Court of Georgia's failure to provide for briefs or argument upon remand from this Court violated petitioner's Sixth, Eighth and Fourteenth Amendment rights?

IV. Whether petitioner was denied due process of law by the trial court's failure to conduct an evidentiary hearing and make a finding as to his competency to stand trial where the psychiatrists who reported to the court diagnosed petitioner as schizophrenic and were evenly divided in their opinions as to his competency and where there was evidence that petitioner had engaged in bizarre and irrational behavior?

V. Whether petitioner was denied his Sixth and Fourteenth Amendment rights as construed in Witherspoon v. Illinois when several venirepersons were prematurely excluded for cause upon expressing doubt about whether they could impose a penalty of death without determining whether they could consider the death penalty in this case?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

OPINION BELOW

The original decision of the Supreme Court of Georgia is reported as Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (1980). The opinion is appended to this petition at 1a. That judgment was vacated and this case remanded for further consideration in light of Godfrey v. Georgia, 446 U.S. 420 (1980), by this Court on November 17, 1980. Thomas v. Georgia, ___ U.S. ___, 66 L.Ed.2d 285, 101 S.Ct. 523 (1980). Thereafter, the Georgia Supreme Court issued an "Addendum" to its opinion which is reported as Thomas v. State, ___ Ga. ___, 275 S.E.2d 318 (1981). The addendum is appended to this petition at 7a.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on March 3, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting

here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendement to the Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ."

The Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

This case involves the seventh aggravating circumstance of Georgia's death penalty statute, Ga. Code Ann. § 27-2534.1(b)(7), which provides for the death penalty where:

> The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

This case also involves Georgia's statute pertaining to one's competence to stand trial, Ga. Code Ann. § 27-1502, which provides:

> (a) Whenever a plea is filed that a defendant in a criminal case is mentally incompetent to stand trial, it shall be the duty of the court to cause the issue of the defendant's mental competency to stand trial to be first tried by a special jury. If the special jury finds the defendant mentally incompetent to stand trial, the court shall retain jurisdiction over the defendant, but shall transfer the defendant to the Department of Human Resources.
>
> (b) Within 90 days after the Department of Human Resources has received actual custody of a person pursuant to subsection (a), such person shall be evaluated and a diagnosis made as to whether the person is

presently mentally incompetent to stand trial and if so, whether there is a substantial probability that the person will attain mental competency to stand trial in the foreseeable future. If the person is found to be mentally competent to stand trial, the department shall immediately report that finding and the reasons therefore to the committing court and the person shall be returned to the court as provided in subsection (e).

(c) If the person is found to be mentally incompetent to stand trial by the Department of Human Resources and there is not a substantial probability that the person will attain competency in the foreseeable future, the department shall report that finding and the reasons therefore to the committing court and the person provided that such person meets the criteria for civil commitment, shall thereupon be civilly committed to a State institution . . . .

. . .

(e) A person who is found by the Department of Human Resources to be mentally competent to stand trial shall be discharged into the custody of a law enforcement officer of the jurisdiction of the court committing such person to the department, . . .

(f) Any person returned to the court as provided in subsection (e) shall again be entitled to file a special plea hereunder.

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari from this Court to the Supreme Court of Georgia to review a decision of that court affirming his conviction of murder and his sentence of death in the Fulton County Superior Court.

The petitioner, a 19-year-old black male with a ninth grade education, was convicted of murder on October 24, 1979 following a jury trial. That same day, the jury recommended that petitioner be sentenced to death. On October 25, 1979, the trial court issued an Order of Execution. R. 119. 1/

From the outset, there was a question as to the competency

1/ "R." refers to the Record on Appeal to the Supreme Court of Georgia.

of the petitioner to stand trial. Within three weeks of petitioner's indictment, the trial court ordered him examined by the psychiatric staff at Grady Memorial Hospital "for the purpose of determining whether or not he is capable of standing trial and participating in his own defense, and, whether or not Defendant was mentally competent at the time of the alleged offense or offenses." R. 5.

The petitioner was first examined pursuant to the Court's order on June 1, 1979, by Dr. Lloyd T. Baccus, M.D., the director of the inpatient psychiatry division of the Psychiatry and Law Service of Grady Memorial Hospital in Atlanta. Dr. Baccus reported to the Court that the petitioner "had no idea of the month or day," his speech was "characterized by tangential to loose associations," his affect was "markedly flattened" and his mood "depressed." 2/ During the examination, Dr. Baccus reported, the petitioner "became increasingly restless and agitated, eventually ceasing to respond to questions while rocking back and forth in the chair and rubbing his genitals with his hands." Because of the petitioner's mental condition, the clinical interview could not be completed and the doctor was unable to elicit any substantial family or personal history. Dr. Baccus was also unable to offer an opinion as to the petitioner's mental status at the time of the offense because petitioner's "state of disorganization was of such a degree that he was unable to offer any coherent statements regarding the offense." App. at 9a.

These observations were found by Dr. Baccus to be "clearly indicative of a diagnosis of schizophrenia." He also reported that the petitioner "did not appear to appreciate his role in the proceedings," was "unable to actively participate in the legal proceedings," and was "so substantially impaired as a result of

---

2/ Three reports were received by the trial court regarding competency and made a part of the record. The reports are included in the appendix to this petition. Dr. Baccus' report appears at 9a.

psychiatric symptoms as to be unable to assist his attorney in the preparation and implementation of his defense." App. at 10a.

Upon the basis of Dr. Baccus' report, petitioner entered a special plea of incompetency to stand trial and moved the court to transfer him to the Department of Human Resources for further evaluation. 3/ Prior to court action on this motion, petitioner was examined by Dr. Sheldon B. Cohen, M.D. Dr. Cohen reported in a letter to the trial judge that the petitioner was unable to provide him with "fundamental, historical information about his mother, four brothers and his work history." Dr. Cohen reported he was unable to make a definite diagnosis or state an opinion as to the competency of the petitioner. App. 11a-12a.

On August 10, after observing that "the Defendant may be presently incompetent to participate in his defense," the trial court ordered that petitioner be transferred to the Department of Human Resources. R. 13. Upon his transfer, an evaluation of the petitioner was conducted by the forensic services division of the Central State Hospital at Milledgeville, Georgia. The Court received a letter dated September 24, 1979, from Dr. Jose M. Delatorre, M.D., the medical director of the forensic services division at Central State. The petitioner was described as follows:

> On admission, Mr. Thomas was noted to be tense, anxious and nervous. His speech was logical, relevant, coherent and goal directed. However, he was somewhat guarded and did not volunteer any information. His psychomotor activity was a little decreased and he spoke in a very low tone. His affect was somewhat flat. He was partially oriented. He denied hallucinations, delusions and suicidal thoughts. Psychological testing reveals he functions in the Borderline range of intelligence. Personality testing suggests the presence of a thought disorder, which resembles that of a schizophrenic process.

3/ Petitioner, through counsel, filed this motion on June 25, 1979. R. 8.

App. at 13a. The letter further stated that petitioner's condition had been diagnosed as "latent schizophrenia," but that he was considered competent to stand trial. The letter did not specify the psychological or personality tests administered to the petitioner, the names and professional qualifications of the personnel who evaluated him, the length of his stay at the hospital, or the length and number of observations of the petitioner by qualified mental health professionals. Beyond the paragraph quoted above, the report did not describe in any detail the mental and emotional makeup of the petitioner, how his emotional and intellectual processes work and their effect on his ability to understand the proceedings and communicate with his attorney, or any additional underlying facts upon which the conclusion as to the petitioner's competency was reached.

Despite the conflicting opinions as to the petitioner's competency and the questions raised by the observations contained in the letters of the three doctors to the court, no evidentiary hearing on competency was ever held. Nor were there any judicial findings as to the competency of petitioner to stand trial.

Trial commenced on October 22. During voir dire each venireperson was questioned individually as to his views on the death penalty. Upon each occasion when the state sought to remove a venireperson for cause based solely upon his view toward capital punishment, trial counsel noted his objection. 4/ During this process, several venirepersons were excluded in advance of any showing that they were either unalterably opposed to the death penalty or that such views would prohibit their impartial determination of guilt or innocence. The death-qualifying voir dire of the five jurors so excluded is appended to this petition at 30a.

At trial, the State presented a circumstantial case. The mother and a playmate of the nine-year-old decedent described the

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4/ Trial transcript [hereinafter "Tr."] 39, Tr. 75-76, Tr. 288.

disappearance of the decedent on April 11, 1979. Fifteen-year-old Linda Cook, petitioner's girlfriend, testified that two days after the decedent had disappeared, the petitioner returned to the room they shared with blood on his pants. Tr. at 350. 5/ She stated that petitioner took her to some railroad tracks where he showed her the body of the decedent and claimed he had killed him. Tr. at 352. While they were there, she testified, the petitioner jumped on the body, and then threw it in some bushes. Id. On cross examination, Ms. Cook admitted that she did not report this to the authorities for a week and did so only after she was charged with concealing a death. Tr. at 364-367. She also testified that petitioner had locked her into their room for the week proceeding April 13, leaving her a bucket for her wastes since she had no access to a bathroom. Tr. at 375-377.

Petitioner's stepfather, Enzor Lowe, testified that petitioner had told him on April 13 that he had killed a boy, but that he did not believe petitioner because petitioner was grinning and appeared "high." Tr. at 390. A medical examiner testified that the cause of death was asphyxiation due to neck trauma. Tr. at 435. He found both postmortem and antemortem injuries to the body. Tr. at 441, 446-447.

The State served notice of its intention to seek the death penalty on the first day of trial, indicating that it would attempt to prove that petitioner committed the offense under aggravating circumstances set out in Ga. Code Ann. § 27-2534.1 (b)(7): "The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind." Prior to trial, petitioner filed a motion to quash as unconstitutional the Georgia statutes providing for the imposition of the death penalty,

5/ The pants identified by Ms. Cook as those worn by petitioner were received in evidence. Tr. at 356, 480. Forensic serologist Linda Tilman testified that the blood on the pants was human blood of international blood group B type. Tr. at 464-465. However, no evidence was offered as to the blood type of the decedent.

and their application to this case. R. at 68. Petitioner objected to the validity and application of the aggravating circumstance statute because it allowed the jury subjective discretion in applying the death penalty in violation of Furman v. Georgia, 408 U.S. 238 (1972), and the Eighth and Fourteenth Amendments to the Constitution. He also contended that the absence of an objective standard for finding aggravating circumstances eliminated the ability of the Georgia Supreme Court to review effectively his death sentence as required by Ga. Code Ann. § 27-2537(f) and the due process clause of the Fourteenth Amendment.

Prior to the penalty phase, petitioner again stated his objection to the lack of an objective standard for finding aggravating circumstances which would permit the imposition of the death penalty:

> I would further reraise my objection to the notice of statutory aggravating circumstances served upon me, and that is 27-2534.1 parenthesis 7, on the grounds that it's vague and has no objective standard to be applied in deciding whether that statutory aggravating circumstance exists.

Tr. at 550. The Court overruled the objection and in addressing the issue of an aggravating circumstance to the jury, instructed as follows:

> In this case the state contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.
>
> Such a circumstance is defined as a statutory aggravated circumstance under the law of this state.

Tr. at 565-566, App. at 15a-16a. The jury was not instructed as to what evidence it could properly consider in determining whether the statutory aggravating circumstance had been proven. And it was not given any limiting instruction with regard to its consideration of petitioner's prior convictions.

The jury returned a written verdict recommending death and stating its finding that the murder "was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind." Tr. at 571.

Petitioner noted a timely appeal of his conviction to the Supreme Court of Georgia. He asserted that the trial court erred in proceeding to trial without resolving the issue of his competency; that the jury was not selected in accordance with the principles set forth in Witherspoon v. Illinois, 391 U.S. 511 (1968), that the jury was not provided with an objective standard for determining whether aggravating circumstances existed which would permit imposition of the death penalty; and that the evidence did not support the finding that the murder was "outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind." Ga. Code Ann. § 27-2534.1(b)(7).

The Georgia Supreme Court affirmed petitioner's conviction. With regard to the competency issue, the Supreme Court held:

> [T]he [trial] court did not find the appellant incompetent to stand trial, but stated . . . that the appellant "may be presently incompetent." The doctors at Central State . . . certified his competency to stand trial. The appellant was returned to Fulton County . . . and proceeded to trial without objection.

Thomas v. State, 245 Ga. 688, ___, 266 S.E.2d 499, 502-03 (1980), App. at 4a-5a.

The Georgia Supreme Court found petitioner's Witherspoon argument equally meritless. Without explaining the scope of its review of the record, the court held:

> It is clear from the voir dire examination that the jurors excused were "irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings."

266 S.E. 2d at 502, App. at 4a.

In reviewing the death sentence, the Georgia Supreme Court

the Georgia Supreme Court upheld the guidance given to the jury, stating, "We have reviewed the trial court's instructions to the jury during the sentencing phase of the trial and find them free of the defects dealt with in Hawes v. State, 240 Ga. 327, 240 S.E.2d 883 [(1977)]; Fleming v. State, 240 Ga. 124, 240 S.E.2d 37 (1977)." 266 S.E.2d at 503, App. at 5a. The court did not elaborate. The Georgia Supreme Court also concluded that "a rational trier of fact was authorized to find beyond a reasonable doubt that the murder was outrageously and wantonly vile and inhuman in that it involved torture and depravity of mind." Id.

This Court vacated the judgment of the Georgia Supreme Court and remanded the case to it for further consideration in light of Godfrey v. Georgia, 446 U.S. 420 (1980), on November 17, 1980. 6/ Petitioner then filed in the Georgia Supreme Court a motion for full briefing and for oral argument, which is appended to this petition at 20a. In the motion, petitioner asked for the opportunity to address the following issues: (1) whether he was entitled to a new sentencing hearing because the trial court failed to instruct the jury on the proper construction of the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7); (2) whether the statutory provision was applied in an unconstitutionally vague or overbroad fashion in petitioner's case; and (3) whether the trial court's failure to conduct an evidentiary hearing and make findings on the issue of petitioner's mental competency deprived him of due process of law. The Georgia Supreme Court did not issue a ruling on the motion. However, without briefs or arguments, it issued an "addendum" to its opinion in which it upheld the death sentence imposed by the jury.

In the addendum, the Georgia Supreme Court distinguished

6/ Thomas v. Georgia, ___ U.S. ___, 101 S.Ct. 523, 66 L.Ed.2d 285 (1980).

this case from the facts of Godfrey v. Georgia, 7/ and found that the fact that the victim was beaten and choked to death would support a finding of serious physical abuse prior to death which, the Georgia Supreme Court has held, constitutes "torture." Thomas v. State, supra, 275 S.E.2d 318-19; Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), cert. denied ___ U.S. ___, 66 L.Ed.2d 611 (1981). The Georgia Supreme Court also held:

> In addition, the appellant had a large amount of blood on the front of his pants when he returned to the room where he kept [his girlfriend] and the victim's pants had been partially removed. The state further introduced the defendant's prior record for child molestation and assault with intent to rape during a pre-sentence hearing. Such evidence would authorize a finding of serious sexual abuse to the victim, which would constitute serious physical abuse.

275 S.E.2d at 319. The court did not elaborate on its conclusion that petitioner's prior convictions were evidence that the decedent was sexually abused.

Petitioner now seeks a writ of certiorari from this Court to review the decision of the Georgia Supreme Court.

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

7/ The court stated: "This was not a domestic murder and the victim gave the appellant no reason to assault him nor was the victim subjecting the appellant to any emotional trauma. The appellant sought to avoid detection of his crime. See Godfrey v. Georgia, supra.

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE GEORGIA SUPREME COURT EMPLOYED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE WORDS "TORTURE" AND "DEPRAVITY OF MIND" IN UPHOLDING PETITIONER'S DEATH SENTENCE AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Petitioner's sentence of death rests upon a finding that the offense of murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." This aggravating circumstance is set out in Georgia Code Ann. § 27-2534.1(b)(7). 8/ In Gregg v. Georgia, 428 U.S. 153 (1976), this Court held that the statutory aggravating circumstance contained in section (b)(7) was not unconstitutional on its face, but warned that it should not be given "an open-ended construction." Id. at 201 (opinion of Stewart, Powell and Stevens, JJ.). In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court reversed a decision of the Georgia Supreme Court where it had failed to apply in that case a narrow construction of section (b)(7) necessary to avoid the arbitrary and capricious infliction of the death sentence.

Despite the teaching of Gregg, Godfrey and Furman v. Georgia, 408 U.S. 238 (1972), the Georgia Supreme Court upon remand of this case for further consideration in light of Godfrey, defined and construed the terms of (b)(7) in such a way as to apply those terms to any assault of lethal magnitude. The question of whether the Georgia court is properly following Godfrey presents an important consitutional issue which should be settled by this Court. Therefore, a writ of certiorari should issue to review the decision of the Georgia Supreme Court.

8/ Ga. Code Ann. § 27-2534.1(b)(7) provides that the death penalty may be imposed if "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Petitioner's jury was not instructed with regard to aggravated battery.

In reaffirming the death penalty, the Georgia Supreme Court held that the jury was authorized to find torture because of serious physical and sexual abuse of the victim. It based its finding of serious physical abuse upon the fact that petitioner admitted that he killed the decedent by "beating him with a stick and choking him to death." 275 S.E.2d at 319. The only evidence as to the circumstances of death were provided by petitioner's fifteen-year-old girlfriend, who related the admission in her testimony, and the medical examiner. The medical examiner found antemortem bruises to the neck caused by strangulation which was the cause of death. Tr. 434, 435, 441. He also found two lacerations on the top of the head and minor bruises and abrasions on the arms and chest of the decedent. Tr. at 433. There was no testimony as to whether these injuries were sustained before or after death, although it appears from the testimony that some were postmortem. Tr. at 441. Thus, there was no evidence to suggest that the decedent was subject to prolonged physical abuse or pain prior to death which would authorize a finding beyond a reasonable doubt of torture. 9/

The Georgia Supreme Court based its finding of serious sexual abuse upon the petitioner's prior convictions for sex offenses and the fact that the pants of the decedent were partially removed when the body was discovered. This finding of sexual abuse was not made by the trial judge in his report to the Georgia Supreme Court 10/ and was only suggested as a possible motive by the

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9/ As this Court observed in Godfrey, supra, the Georgia court has held that "'Torture' must be construed in pari materia with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death." Id. at 431 [emphasis added]. See also Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980) cert. denied, ___ U.S. ___, 66 L.Ed.2d 611 (1981). In his report to the Georgia Supreme Court, the trial judge expressed his view that the death penalty was appropriate because of "Unexplained strangulation of a 9-year old child; brutality of child's corpse." Report of Trial Judge at 6. Supplemental R. 6. [Emphasis added].

10/ The trial judge reported to the Georgia Supreme Court that the murder was "unexplained." Report of Trial Judge at 6, Supplemental R. 6.

prosecutor at trial. 11/ There was no forensic evidence of sexual abuse of the decedent. The petitioner's girlfriend, who testified that petitioner showed her the corpse, did not testify that the pants were partially removed when she saw the body. Finally it should be noted that petitioner's prior convictions provide no basis for either the jury or the Georgia Supreme Court to infer that the crime was committed in a certain manner. 12/ The fact the Georgia Supreme Court found this to be a basis upon which the jury could have found sexual abuse beyond a reasonable doubt aptly demonstrates the failure of that court to employ a proper, narrow construction of the terms of section (b)(7).

Thus, the Georgia Supreme Court, in reviewing the sentence of death in petitioner's case, has applied a construction of the term "torture" which is so overly broad as to encompass any assault of lethal magnitude. As Mr. Justice Marshall pointed out in his concurrence in Godfrey:

> The Georgia court has given an extraordinarily broad meaning to the word "torture." Under that court's view, "torture" may be present whenever the victim suffered pain or anticipated the prospect of death. . . . That interpretation would of course enable a jury to find a § (b)(7) aggravating circumstance in most murder cases.

Godfrey v. Georgia, supra at 441 n. 12 (Marshall, J., concurring). In petitioner's case and other cases considered in light of Godfrey, the Georgia Supreme Court has continued to apply such an

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11/ In her closing argument the prosecutor, after observing that she was not required to prove any motive but suggesting that the motive may have been sexual molestation, stated: "You can accept it or reject it. It may even have been a thrill killing. . . . He may have killed for the way he looked." Tr. at 510-511.

12/ The principle that "'the doing of one act is in itself no evidence that the same or a like act was again done by the same person' has been so often judicially repeated that it is commonplace." 1 Wigmore, Evidence § 192 at 642 (3d ed. 1940) [citations omitted]; McCormick, Evidence § 157 (2d ed. 1972); 1 Underhill, Criminal Evidence §§ 205-12 (5th ed. 1956); Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964).

extraordinarily broad meaning to the word "torture" in upholding death sentences under section (b)(7). See, e.g., Mulligan v. State, 245 Ga. 881, 268 S.E.2d 351 (1980), cert. denied, ___ U.S. ___, 66 L.Ed.2d 250 (1980) (where decedent shot four times and first shot was not fatal, jury was authorized to find serious physical abuse constituting torture prior to death); Brooks v. State, ___ Ga. ___, 271 S.E.2d 172, 173 (1980), cert. denied, ___ U.S. ___, 49 U.S.L.W. 3785 (1981) (where decedent shot once in neck and died within two hours, jury authorized to find torture because death not instantaneous; Baker v. State, ___ Ga. ___, 272 S.E.2d 61, 62 (1980), cert. denied ___ U.S. ___, 67L.Ed.2d 371 (1981) (where victim struck with a whiskey bottle and shot three times in the chest, jury authorized to find torture). 13/

The Georgia Supreme Court's treatment of the (b)(7) issue here provides "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, supra at 433 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). Because the Georgia court's construction of (b)(7) raises an important constitutional issue which should be settled by this Court, a writ of certiorari should issue to review that court's decision.

13/ Thus, the Georgia Supreme Court has failed to limit (b)(7) to cases such as McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974) and House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), as anticipated by the prevailing opinions in Gregg and Godfrey. Gregg, supra at 201 (opinion of Stewart, Powell and Stevnes, JJ.); Godfrey, supra at 429-30 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). (In McCorquodale, the victim suffered prolonged torture in which she was beaten, burned, bitten, cut with a razor and scissors, sodomized, raped, and subjected to salt being placed in her wounds and hot wax dripped over her body before she was strangled and killed. In House, two seven year old boys were choked to death after each had been forced to submit to anal sodomy.) The Georgia court's cursory treatment of (b)(7) in petitioner's case and other cases indicates that it has not properly limited (b)(7) to a few cases like McCorquodale and House.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER IS ENTITLED TO A NEW SENTENCING HEARING AT WHICH CONSIDERATION OF THE SENTENCE OF DEATH IS PROPERLY GUIDED BY CLEAR AND OBJECTIVE STANDARDS.

Petitioner's jury was instructed that it could impose the death penalty pursuant to Ga. Code Ann. § 27-2534.1(b)(7) if it found that the offense of murder was "outrageously and wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." Tr. at 565-566, App. at 15a. The jury was provided with no definition of "torture" or any other terms of (b)(7) in the trial court's instructions. Nor was it instructed as to the limited purposes for which petitioner's prior convictions for child molestation and assault with intent to rape were admitted, assuming that those convictions were properly admitted at the sentencing hearing. 14/

The jury in returning its sentence of death made no specific findings of fact, but merely parroted the language of the statute which had been quoted to them by the trial court. Thus, as in Godfrey v. Georgia, supra, the trial judge's sentencing instructions "gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation." Godfrey v. Georgia, supra, at 429 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.).

14/ Prior convictions provide no basis for imposing the death penalty pursuant to section (b)(7). Although such convictions might be properly admitted in rebuttal of evidence of mitigation or to impeach the credibility of the defendant if he testified, no evidence of mitigation was offered on behalf of petitioner and he did not testify. Thus, it appears that the prior convictions were not properly admitted at petitioner's sentencing hearing. But see Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979).

Because petitioner's sentencing hearing before the Georgia trial court was constitutionally defective, it must be determined whether he is entitled under the Constitution to a new sentencing hearing at which the sentencer's discretion will be properly directed and channeled in accordance with Furman v. Georgia, supra, Gregg v. Georgia, supra, and Godfrey v. Georgia, supra. Although petitioner moved the Georgia Supreme Court for the opportunity to brief and to argue this issue, he was not given that opportunity by the court. The Georgia court did not discuss the issue in its addendum. Nevertheless, its reimposition of the death penalty without a hearing constitutes a determination that a new sentencing hearing is not required. Petitioner submits that this important constitutional issue should be settled by this Court.

Mr. Justice Marshall addressed the issue in his concurrence in Godfrey, expressing the view that only a properly instructed jury may impose the sentence of death: 15/

> The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards. . . . To give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to any murder . . . -- would effectively grant it unbridled discretion to impose the death penalty.

446 U.S. at 437 (Marshall, J., concurring). See also Davis v. Georgia, ___ U.S. ___, 49 U.S.L.W. 3785 (1981) (Marshall, J., dissenting from denial of certiorari); Hill v. Georgia, ___ U.S. ___, 49 U.S.L.W. 3785 (1981) (Marshall, J., dissenting from denial of certiorari); Willis v. Balkcom, ___ U.S. ___, 49 U.S.L.W. 3786 (1981) (Marshall, J., dissenting from denial of certiorari). The

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15/ Under Ga. Code Ann. §§ 26-3102, 27-2503(b) the sentencing authority in death cases is the jury.

exercise of such unbridled discretion cannot be salvaged by appellate review. Here, as in Godfrey, "the standardless and unchanneled imposition of the death sentences in the uncontrolled discretion of a basically uninstructed jury . . . was in no way cured by the affirmance of those sentences by the Georgia Supreme Court." 446 U.S. at 429 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). As Mr. Justice Marshall stated:

> Such a defect could not be cured by the post hoc narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

446 U.S. at 437 (Marshall, J., concurring).

The Georgia Supreme Court's speculation as to what the jury did find, what it could have found and what it was authorized to find based upon its review of a cold record is, therefore, inconsistent with this Court's opinions in Godfrey, Gregg and Furman. See also Presnell v. Georgia, 439 U.S. 14 (1979); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91-92 (1965). Because of the importance of this issue in the review of death penalty cases, this Court should grant certiorari to review the decision of the Georgia Supreme Court.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE GEORGIA SUPREME COURT'S FAILURE TO PROVIDE PETITIONER A RIGHT TO BE HEARD ON REMAND VIOLATED HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Upon remand of this case to the Georgia Supreme Court, petitioner filed in that court a motion for full briefing and for oral argument on the issues of petitioner's sentence of death and his competency for trial. 16/ The Georgia Supreme Court apparently

16/ The motion is appended to this petition at 20a.

did not act on the motion, but issued an addendum to its opinion reimposing the death penalty without briefs or arguments. This Court should grant certiorari to determine whether such procedures are constitutionally sufficient.

This Court has cautioned that the "qualitative difference" under the Eighth Amendment between death and any other punishment requires a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific area." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also, Lockett v. Ohio, 438 U.S. 586, 601 (1978); Beck v. Alabama, 447 U.S. 625, 643 (1980). The cavalier summary disposition of petitioner's case on remand, without recognition or treatment of the important questions remaining after this Court's decision in Godfrey v. Georgia, supra, is inconsistent with this constitutional responsibility of the Georgia court.

Moreover, petitioner is entitled under the Sixth and Fourteenth Amendments to the effective assistance of counsel both in sentencing proceedings, Mempha v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948), as well as on appeal, Douglas v. California, 372 U.S. 353 (1963). To be meaningful, this right must include the right to brief and to argue the important issues presented here to the Georgia Supreme Court before it reinstates the sentence of death.

In Gardner v. Florida, 430 U.S. 349, 358 (1977), this Court observed that it "is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on a reason rather than caprice or emotion." The Georgia Supreme Court, no less than any other judicial component in the awesome process of determining life and death, is held to a higher standard under the Constitution than it met in petitioner's case below.

IV. THE FAILURE OF THE GEORGIA SUPREME COURT TO FIND THAT AN EVIDENTIARY HEARING WAS REQUIRED WHERE THERE WAS SUBSTANTIAL EVIDENCE OF THE PETITIONER'S INCOMPETENCY CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEAL.

Despite information before the trial court which raised a substantial question as to petitioner's competency to stand trial, that court failed to conduct an evidentiary hearing and make a determination of petitioner's competency to understand the proceedings against him and properly assist in his own defense.

The question of petitioner's competency arose almost immediately upon his indictment. The trial court received three psychiatric reports before trial which were evenly divided in the opinions they contained as to petitioner's competency. The reports indicated that petitioner suffered from schizophrenia, had difficulty communicating, was at best only "partially oriented," and was of "borderline" intelligence. 17/ On the basis of one opinion by a psychiatrist that petitioner was incompetent to stand trial, a special plea of incompetency was entered. At trial, the court heard evidence of bizzare and irrational behavior on the part of the petitioner in locking his girlfriend in a room for a week, showing her the body of the decedent and then jumping on the body. 18/ There was also evidence that petitioner admitted killing the decedent to his stepfather, but he was grinning and appeared "high" when doing so and was not believed. 19/

The Georgia Supreme Court rejected petitioner's assertion that he should not have been tried until resolution of the competency issue, basing its decision on the fact that Central State Hospital "certified" his competency to the court and, apparently, its view that petitioner may have waived the issue by

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17/ The three reports appear in the appendix to this brief at 9a-14a.

18/ Tr. at 352, 375-377.

19/ Tr. at 390.

proceeding to trial "without objection." Thomas v. State, 245 Ga. 688, ___, 266 S.E.2d 499, 502-03 (1980), App. at 4a-5a. In doing so, the Georgia Supreme Court sanctioned a marked departure from the holdings of this Court, other state courts of last resort, and federal courts of appeal. Therefore, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

This Court has made it clear that "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Drope v. Missouri, 420 U.S. 162, 172 (1975), citing Pate v. Robinson, 383 U.S. 375, 378 (1966). See also Bishop v. United States, 350 U.S. 961 (1956) reversing 96 U.S. App. D.C. 117, 120, 223 F.2d 582, 585 (1955). In both Drope and Robinson this Court, although finding that state statutory schemes "jealously guarded" this right, 20/ reversed convictions because of the failure of trial courts to utilize adequate procedures once a question as to the competency of the defendant was raised. The Court pointed to three factors -- evidence of a defendant's irrational behavior, any medical opinions on competence, and a defendant's demeanor at trial -- as being relevant to determining whether further inquiry is required and stated that "even one of these factors standing alone may, in some circumstances, be sufficient." Drope, supra at 180. 21/

20/ Robinson, supra at 385, Drope, supra at 173.

21/ In Robinson, this Court found that a history of irrational behavior was sufficient to warrant an evidentiary hearing despite the stipulated opinion of a psychiatrist that the defendant knew the nature of the charges and could cooperate with his attorney and the fact that he appeared mentally alert during trial. 383 U.S. at 385-86. In Drope, this Court held that irrational behavior by the defendant prior to trial, a suicide attempt during trial and the suggestion of a psychiatrist and the defendant's lawyer that he needed psychiatric treatment created a sufficient doubt of his competency to stand trial to require further inquiry by the trial court. 420 U.S. at 180.

Where there is conflicting documentary evidence on the question of competency, an evidentiary hearing is required. In Bishop v. United States, supra, this Court reviewed a decision by the Court of Appeals for the District of Columbia Circuit sustaining a determination of a competency question without a hearing on the information before the trial court, including a detailed report of a psychiatrist. See 96 U.S. App. D.C. at 120-121, 223 F.2d at 585-86. In a per curiam decision, this Court vacated the judgment and remanded the case for a hearing on competency. 350 U.S. at 961. In addition, an evidentiary hearing is also necessary, as the Court of Appeals of Oregon has pointed out, to protect other fundamental rights of the accused, such as the rights of cross-examination and confrontation. Brady v. Calloway, 11 Or. App. 30, 36, 501 P.2d 72, 75 (1972). 22/

Accordingly, state and federal courts have held that an evidentiary hearing is constitutionally required when the information before the trial court is sufficient to raise doubt as to the competency of the defendant to stand trial. Osborne v. Thompson, 610 F.2d 461, 462 (6th Cir. 1979); Fitch v. Estelle, 587 F.2d 773, 777 (5th Cir.), cert. denied, ___ U.S. ___, 100 S.Ct. 170 (1979); Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972); Rhay v. White, 385 F.2d 883 (9th Cir. 1967); Commonwealth v. Hill. 375 N.E.2d 1168 (Mass. 1978); State v. Spivey, 65 N.J. 21, 37, 319 A.2d 461, 469 (1974); People v. Pennington, 66 Cal.2d 508, 518-19, 58 Cal. Rptr. 374, 381, 426 P.2d 942, 949 (1967); State v. Jensen,

22/ A trial court cannot delegate its responsibility to the state hospital to "certify" the competency of a defendant. "Like criminal responsibility, incompetency is a legal question; the ultimate responsibility for its determination must rest in a judicial rather than a medical authority. . . . " Note, Incompetency to Stand Trial, 81 Harv.L.Rev. 454, 470 (1976). The commentator also points out that "there is repeated evidence that psychiatrists often misunderstand the test of incompetency . . . . Medical opinion about the defendant's condition should be only one of the factors relevant to a determination." Id. [footnotes omitted.]

278 Minn. 212, 153 N.W.2d 339 (1967). Other courts have protected the right to a determination of competency by rigorously enforcing state statutes requiring evidentiary hearings without reaching the constitutional question. See, e.g., People v. Livingston, 57 Mich. App. 726, ___, 226 N.W.2d 704, 709 (1975), where the court reiterated that "the trial judge must announce, on the record, the commencement of a formal evidentiary hearing into the question of competency" regardless of whether a hearing is requested. 23/

Thus, once the evidence before the trial court is sufficient to raise a reasonable doubt as to competency, the trial court must conduct an evidentiary hearing to resolve the issue.

> [A] due process evidentiary hearing is constitutionally compelled at any time that there is "substantial evidence" that the defendant may be mentally incompetent to stand trial. . . . Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court . . . is not to determine the ultimate issue: Is the defendant competent to stand trial? It [sic] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue. . . .

Moore v. United States, supra at 666. In People v. Pennington, supra, the California Supreme Court held in light of Pate v. Robinson, supra, that its previous interpretation of that state's penal code, which permitted a trial court to resolve conflicting evidence to decide if there was a doubt as to the competency of a defendant, was unconstitutional as applied to a defendant who presented substantial evidence of incompetence. People v. Pennington, supra, 66 Cal.2d at 516-17, 58 Cal. Rptr. at 380, 426 P.2d at 948-49, revising its decision in People v. Merkouris, 52 Cal.2d 672, 344 P.2d 1, cert. denied, 361 U.S. 943 (1960).

23/ But see also State v. Jemison, 14 Ohio St.2d 47, 236 N.E.2d 538, 540 cert. denied, 393 U.S. 943 (1968), where in interpreting an Ohio statute the court approved of referral to the state hospital to determine the issue of competency without an evidentiary hearing.

The Georgia Supreme Court's approval of the failure to conduct a competency hearing in this case is in conflict with these decisions. 24/ There was not only sufficient evidence to create a reasonable doubt as to the petitioner's competency, there was an even division in the opinions of the experts as to petitioner's competency. The report of Dr. Baccus, standing alone, provided a stronger indication of incompetency than was before the trial courts in either Robinson or Drope. 25/ But of course it did not stand alone. One doctor was unable to reach a conclusion as to diagnosis and competency, the report from the state hospital raised serious questions about the mental health of petitioner, and there was evidence at trial of irrational and bizzare behavior on the part of the petitioner. 26/ Thus, the Georgia courts have failed to "jealously guard" the petitioner's right not to be tried or convicted while incompetent.

The Georgia Supreme Court's rejection of petitioner's assertions regarding competency also appears to be based upon a finding of waiver due to petitioner's failure to object to trial

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24/ Although Georgia Code § 27-1502(a) provides for a trial on the issue of competency before a "special jury," no such trial was conducted by the trial court below. This was apparently because the prosecution did not object to transfer of the petitioner to the Department of Human Resources, thereby obviating the need for a finding of incompetency by a special jury to accomplish the transfer as provided in Section 27-1502(a). Subsections (b) and (e) of the statute provide for the return of a person transferred to the Department to the court upon a determination of competency by the Department. Subsection (f) of the statute provides that after return to the court, a person is entitled to again file a special plea of incompetency under the statute. The statute is set out on pages 2-3 of this petition.

25/ In neither Robinson nor Drope did the trial court have before it an expert opinion of incompetency. While in those cases there appeared to be sufficient indicia of mental instability to require further inquiry, here the evenly divided opinions of the psychiatrists who examined petitioner squarely presented an issue for resolution to the trial court.

26/ Indeed, the fact that the trial court entered an order stating that "the defendant may be presently incompetent to participate in his defense" and its transfer of petitioner to the state hospital indicates that the court recognized the substantial evidence of incompetency, and, therefore, it was required to conduct an evidentiary hearing. See, Tillery v. Eyman, 492 F.2d 1056, 1059-60 (9th Cir. 1974) (Sweigert, J. concurring).

after his return from Central State Hospital. Even assuming that the Georgia court could properly find waiver despite the special plea of incompetency and the evidence before it, a holding that an incompetent defendant can waive his right to a determination of competency constitutes a significant departure from well established authority to the contrary and should be reviewed by this Court.

In Pate v. Robinson, this Court observed, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Id. at 384. 27/ State and federal courts have squarely held that the issue of incompetency was not waived by failure to assert it where evidence raising a question of competency was before the trial court. See, e.g., Taylor v. United States, 282 F.2d 16, 23 (8th Cir. 1960), where in a case decided before Robinson, the Court of Appeals held that "if one is mentally incompetent, then, by definition, he cannot be expected to raise that contention before the trial court and thus cannot be prejudiced by his failure to do so. . . ."; Commonwealth v. Hill, supra, 375 N.E.2d at 1170, where the Court citing Robinson, reversed a conviction even though the defendant, unlike petitioner, did not assert at any time prior to trial that he was incompetent; Fitch v. Estelle, supra at 776-777; Rhay v. White, supra at 886; State v. Jensen, supra, 278 Minn. at 216-217, 153 N.W.2d at 342; People v. Livingston, supra, 57 Mich. App. at 726, 226 N.W.2d at 709-10.

Therefore petitioner respectfully submits that in this case the Georgia courts have failed to protect his right not to be tried or convicted while incompetent in violation of the due process

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27/ In his dissenting opinion in that case, Mr. Justice Harlan pointed out that if there were error on the question of competence "such an error is not 'waived' by failure to raise it . . . . Waiver is not an apposite concept where we premise a defendant so deranged that he cannot oversee his lawyers." Id. at 388. (Harlan, J., dissenting).

guarantee of the Fourteenth Amendment. Because of the importance of the departure by the Georgia courts from the authorities cited herein in the context of this death penalty case, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

V. PETITIONER'S SENTENCE OF DEATH WAS IMPOSED BY A JURY SELECTED IN CONTRAVENTION OF THE PRINCIPLES ANNOUNCED IN WITHERSPOON V. ILLINOIS.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court held that "a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment." Adams v. Texas, 100 S.Ct. 2521, 2525 (1980). In holding that only venirepersons who maintain unalterable views toward the death penalty may be excluded purusant to due process, the court stated:

> Veniremen cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by State law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death penalty cannot be carried out, even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion.

391 U.S. at 522 N.21 [emphasis in original].

Since the announcement of Witherspoon, this Court has

repeatedly vacated penalties of death where the record did not unequivocally establish that Witherspoon standards were expressly satisfied. 28/ Just this past term, the Court struck down a practice which permitted the state to strike a venireperson for cause if he could not pledge that "the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." Adams v. Texas, supra at 2524. (Some venirepersons were struck because they indicated the death penalty would affect their deliberations while others were struck because "they were unable positively to state whether or not their deliberations would in any way be affected." 100 S.Ct. at 2528. In Boulden v. Holman, 394 U.S. 478 (1969), this Court held that the fact that some venirepersons acknowledged that they held fixed opinions against capital punishment was insufficient to satisfy Witherspoon as such jurors "might nevertheless be perfectly able as a juror to abide by existing law to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." 394 U.S. at 484. And in Davis v. Georgia, 429 U.S. 122 (1976), this Court held that even the exclusion of one venireperson in the absence of a showing that the venireperson was "irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings" rendered the sentence of death unconstitutional. 429 U.S. at 123. It is in light of this historical commitment to the command of Witherspoon that petitioner submits that several venirepersons were wrongfully excluded for cause from his jury.

28/ Davis v. Georgia, 429 U.S. 122 (1976); Aiken v. Washington, 403 U.S. 946 (1971); Adams v. Washington, 403 U.S. 947 (1971); Harris v. Texas, 403 U.S. 947 (1971); Jaggers v. Kentucky, 403 U.S. 946 (1971); Childs v. North Carolina, 403 U.S. 948 (1971); Quintana v. Texas, 403 U.S. 947 (1971); Taira v. Illinois, 403 U.S. 947 (1971); Whan v. Texas, 403 U.S. 946 (1971); Speck v. Illinois, 403 U.S. 946 (1971); Mathis v. New Jersey, 403 U.S. 946 (1971); Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969).

Early into petitioner's voir dire, venireperson Francis Ogletree was questioned about her views toward capital punishment. 29/ When asked whether she was opposed to the death penalty, she responded in the affirmative, but clearly maintained that she would not automatically exclude its consideration and would consider the evidence of the case. With regard to whether these views would prevent her from making an impartial decision upon guilt or innocence, she simply responded, "I'm afraid it would." Over the objection of defense counsel, the trial court excused Mrs. Ogletree from petitioner's venire.

It is clear that Francis Ogletree was not unalterably opposed to the death penalty and her cryptic retort to the impartiality question hardly can be interpreted to mean only that she was certain she would not be impartial. Her response was of the character which this court has found insufficient for Witherspoon purposes on other occasions. See Wilson v. Florida, 403 U.S. 947 (1971) (reversing Wilson v. State, 225 So.2d 321 (Fla. 1969) (scruples "very well might" affect his verdict; "I believe I would have difficulty" in finding defendants guilty if the penalty may be death); Pruett v. Ohio, 403 U.S. 947 (1971)(reversing State v. Pruett, 18 Ohio St.2d 167, 248 N.E.2d 605 (1969) (scruples "very well might" affect his verdict; "I believe I would refuse to return a verdict of guilty where the penalty was death"). Additionally, she was not asked by the court whether in spite of her views she could follow an instruciton that she consider only the evidence presented at trial to determine petitioner's guilt. Because Mrs. Ogletree's exclusion was, in the least, premature, petitioner's rights pursuant to Witherspoon were infringed.

29/ Tr. at 37-39, App. at 30a-32a.

In another instance, the court, over defense objection, struck venireperson Joyce Beachum despite several assurances that she was not irrevocably opposed to the death sentence and could be impartial with regard to petitioner's guilt or innocence. Tr. at 68-76, App. at 33a-41a. When first asked about her views on the death penalty by the court, Mrs. Beachum responded that she had never thought about it. Upon being asked whether she would automatically vote against imposition of the penalty she stated, "No." She then retorted that her attitude would not prevent her from making an impartial decision upon guilt or innocence. Not satisfied with these responses, the prosecutor asked a series of questions in the vein of whether Mrs. Beachum could "write out a death sentence on a person." While stating she did not think she could write it out or help impose it, 30/ she did say she could "consider imposing it" but could not vote for it.

Upon questioning by defense counsel, Mrs. Beachum then simply stated she was conscientiously opposed to capital punishment. Once again the court sought to determine Mrs. Beachum's tr... attitudes.

> Court: . . . is your view of the death penalty such that under no circumstances would you ever vote to impose the death penalty?
>
> Mrs. Beachum: No.
>
> Court: Are you telling me that you can conceive of situations wherein you would vote to impose the death penalty?
>
> Mrs. Beachum: Yes.

Tr. at 72, App. at 37a. The court then reminded Mrs. Beachum that capital punishment in Georgia meant electrocution and she responded that she understood. And finally, after being asked the impartiality question, she again responded, "I think I could make a fair judgment." Tr. at 73, App. at 38a.

30/ It is not clear what the prosecutor had in mind with the phrase "imposing it" and it is certainly not clear how Mrs. Beachum interpreted it.

At this point, the government asserted its claim that Mrs. Beachum should be struck for cause. After defense objection, the court proceeded with further inquiry. Again, Mrs. Beachum asserted that she could impose the death penalty, if it was the last alternative. Finally, in response to the court's question of whether there was any case she could conceive of where she would vote to send someone to the electric chair, she responded, "No."

The court understood this last answer to mean Mrs. Beachum was unalterably opposed to capital punishment ("I know what she has done. She has said three or four different things, but the last time she said she could not." Tr. at 75, App. at 40a). Upon the government's motion to strike for cause, the court granted the motion and commented:

> Well, I think, as a matter of fact, I will strike her for cause, and I will have to do that as I understand the law. I agree with you that she is quite ambiguous about it, but when it comes down to talking about sending someone to the electric chair to be executed her ambiguity seems to fade away.

Tr. at 76, App. at 41a. [Emphasis added].

Despite her repeated assurances that she could be impartial and could impose the penalty, the court chose to disregard these clear indicia of Mrs. Beachum's attitude and found her irrevocably opposed to the death penalty on the basis of his last inquiry. Yet the court did not ask her whether she was unalterably opposed to the death sentence during his final questions; he instead asked her whether she could conceive of a case where she would vote for the sentence of execution. In responding no, Mrs. Beachum's inability to immediately provide an example does not necessarily indicate that she could never vote for capital punishment. Indeed, in light of her prior answers, Mrs. Beachum's response can best be interpreted only to mean that at that moment she could not describe a case where she would, without doubt, vote for the sentence of execution. Whether a

juror can dream up a circumstance which would warrant capital punishment is not the question. It is instead whether the attitude of the juror will preempt altogether any consideration of the death penalty or interfere with an impartial determination of guilt or innocence. With regard to these two inquiries, Mrs. Beachum was clear: she was not irrevocably opposed to the penalty and she could be impartial. The court's striking her for cause thereby offended petitioner's rights pursuant to Witherspoon. 31/

In summary, petitioner was denied his Sixth and Fourteenth Amendment rights in that venirepersons were excluded from his jury simply because they expressed varying degrees of doubt about whether they could vote to impose a sentence of death upon another human being. The Constitution, as interpreted in Witherspoon through Adams v. Texas, permits such exclusion only if the venireperson clearly indicates a total repudiation of the penalty or an unalterable view that such feelings will preclude an impartial decision upon the merits of the case. As this Court has repeatedly stressed the clear parameters of Witherspoon, petitioner prays that this Court grant his petition and summarily reverse his sentence of death.

31/ Several other venirepersons were struck before a satisfactory Witherspoon predicate had been established. Evelyn Thompson was excused after she stated she was not sure what capital punishment meant, that she would not automatically vote against it, but that she was afraid that she would be unable to remain impartial. Tr. at 114. Both Christine Rease and Eddie Watkins were excused after giving contradictory and ambiguous remarks. Ms. Reese said she could consider the death penalty and could be impartial yet responded no when asked if she could send someone to the electric chair. Tr. at 286-288. Mr. Watkins expressed a reluctance to impose a sentence of electrocution; he stated he could be impartial yet then stated he could not vote for a sentence if it meant electrocution. Tr. at 77. Immediately after Mr. Watkins' voir dire, the trial court remarked that he was going to inform each venire person before questioning that they would be questioned as to their views on the death sentence "so that they can be thinking about that, and don't get hit, maybe, cold." Tr. at 78. The death-qualifying voir dire of these jurors is appended to this petition at 30a-50a.

CONCLUSION

Petitioner prays that a writ issue to review the judgment of the Supreme Court of Georgia.

Respectfully submitted,

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